Section Six: Ethical Considerations – Involvement of the Judiciary in Court and Community Collaboration Programs

PART 1. INTRODUCTION: THE ROLE OF THE JUDICIARY IN COURT AND COMMUNITY COLLABORATION ACTIVITIES

This section of the handbook presents two distinct sets of information prepared by the Special Task Force on Court/Community Outreach. **Part 1** focuses on the importance of the role of the judiciary in court and community collaboration activities, the sources of ethics authority sought and relied on in the ethics compendium, and suggested guidelines developed by the task force. **Part 2** is a comprehensive ethics compendium that presents code, case law, and advisory opinion authority related to ethical issues to help judges determine appropriate levels and types of involvement in court and community collaboration activities.

It is important to note that:

1. **The controlling authority for state judges in California is the Code of Judicial Ethics adopted by the Supreme Court in 1996;**
2. **All of the guidelines and authority presented in this section, including advisory opinions issued by the California Judges Association Ethics Committee, are *advisory* in nature and are not binding on any judicial disciplinary authority for state judges in California;**
3. **Each judge should check all authority for amendments or additional rulings that may have occurred since the time this handbook was published; and**
4. **Each judge must make his or her own determination as to whether any contemplated activity is consistent with the Code of Judicial Ethics.**

There are certain principles implicit in the independence of judicial decision making and certain constraints imposed by the Code of Judicial Ethics of which judicial officers should be aware when considering their roles in court and community collaboration activities. Implicit in these principles and constraints is the notion that judges are leaders in their communities and, as such, have a professional responsibility to ensure that the courts are fulfilling their appropriate role for the preservation of the rule of law in their communities. Thus, the question for judicial officers is not "How can judges avoid community involvement to ensure compliance with the canons of ethics?" Rather, the

question is “How can judges most effectively balance their community leadership responsibilities within the appropriate limitations?”

There are legitimate concerns about judicial involvement in court and community collaboration programs that arise from some of the canons of judicial ethics. “[T]he current climate [of declining public trust and confidence] creates both an exceptional opportunity and an unprecedented need for judges to respond with educational efforts that will ameliorate the public’s misconceptions about the justice system and strengthen its commitment to an independent judiciary.”[1]

Recognizing appropriate judicial limitations on community involvement, the Judicial Council encourages judges to actively participate in court and community collaboration programs within permissible limits. To enable judges to do so, it is important that judges be provided guidelines that support their community outreach activities while ensuring compliance with the canons of ethics.

Sources of Information

To assist the task force in developing the ethics guidelines and compendium presented here, expertise in the area of judicial ethics and court and community collaboration was sought from outside sources. The Code of Judicial Ethics adopted by the Supreme Court of California in 1996 is the governing authority for the conduct of all California’s state judges. In addition to looking to the California code, the task force also considered information from the California Judges Association (CJA) and the American Judicature Society, and assorted secondary material including advisory opinions and case law from other states, and treatises by experts in the field of judicial ethics.

The California Judges Association

In response to a general inquiry from the task force about judicial involvement in such programs, the Ethics Committee of the California Judges Association provided the following guidance:[2]

[1] Gray, *When Judges Speak Up: Ethics, The Public and The Media (*Chicago: American Judicature Society, 1998), p. 24

[2] The initial inquiry was submitted by the Special Task Force on Court/Community Outreach to the CJA Ethics Committee in June 1998. After issuing its preliminary opinion, the CJA committee considered the detailed ethics analysis and proposed guidelines presented in the following pages. The committee then confirmed the final version of its opinion as it appears here.

> While participating in Community Outreach Programs, judges should be mindful of the provisions of the California Code of Judicial Ethics which governs such activities. Judges may not make public comments about pending or impending cases in any court, nor should they take positions or give advice on issues which could come before the court. It is often helpful to advise community participants of these constraints at the outset of a Public Outreach Program.
>
> Judges must at all times comport themselves in a manner which maintains public confidence in the impartiality, independence and integrity of the judiciary. Judges should avoid activity which detracts from the dignity of judicial office, and must refrain from activity which creates the appearance of bias. Finally, judges should ensure that participation in community programs does not interfere with the performance of judicial duties.

This pronouncement provides good general advice to judicial officers regarding the nature of limitations of which they should be cognizant. Using the initial CJA Ethics Committee opinion as a foundation, the task force sought additional resources about specific canons of ethics to provide more detailed guidance to judicial officers.

The American Judicature Society

In 1998 the American Judicature Society, under a grant from the State Justice Institute, published a comprehensive self-study guide for judges and court staff entitled *When Judges Speak Up: Ethics, the Public and the Media.* The instructor's manual for this study course contains an overview of ethical issues that may face judges involved in community outreach and education activities. This well-researched overview provides substantial support for its conclusions by reference to:

- the 1990 and 1972 American Bar Association Model Codes of Judicial Conduct (which are not binding on California's judges, see introduction to Part 2 Ethics Compendium),
- state advisory opinions issued by judicial ethics committees, and
- state and federal case law throughout the United States.

General Ethical Principles and Constraints

Based on a review of the ethics authorities presented in the compendium, the task force identified the following general principles and constraints that it recommends judges and court administrators keep in mind:

- As persons specially learned in the law, judges are in a unique position to participate in efforts to promote the fair administration of justice, the independence of the judiciary, and the integrity of the profession.
- Judges are permitted to engage in community outreach activities as long as those activities do not interfere with the performance of their adjudicative duties or cast doubt on their capacity to decide impartially any issues that may come before them.
- Judges may participate in a wide variety of public education programs, including the use of the media, but should generally avoid spontaneous or impromptu responses because of the increased risk of making a statement that could compromise impartiality.
- Except for purposes of explaining for public information the procedures of the court and engaging in scholarly teaching and writing, judges should, when participating in such outreach and education activities, refrain from public comments that relate to:
  - Pending cases, including those pending before the judge or before another judge in the same jurisdiction, cases pending on appeal, and cases pending in another jurisdiction;
  - Impending cases (those where an investigation is under way but no arrest or charges exist or a civil action that is anticipated to be filed); and
  - Criticism about the judge's handling of a pending case.
- Judges may comment on a case that the judge or others have decided after final disposition (including all appeals), although caution is still necessary so that the judge does not demean the judiciary.
- Judges should use caution in commenting on controversial issues to ensure that the public does not misunderstand the comments and conclude that the judge is unwilling to enforce the law.
- Judges should not commit themselves to positions or action on future cases.
- Judges should not become publicly involved with any political activity that is not directly related to the improvement of the law, the legal system, or the administration of justice.
- Judges must be careful to refrain from insensitive and stereotyped statements that may raise questions of bias or prejudice or cast doubt on the judge's ability to act impartially.
- Judges should carefully consider in advance the nature of the audience to be addressed and whether their participation would tend to identify them with the aim or purpose of that organization. One way to do this is to make oneself available to groups on both

sides of an issue.

- Judges should refrain from speaking at political gatherings except to speak on behalf of themselves or other candidates for judicial office.
- To avoid questions of impartiality, judges should use caution when making comments about specific lawyers.
- Judges should use caution in drawing the public's attention to a problem in their courts, the misconduct of other judges, and the justice system in general, to avoid undermining public confidence in the judiciary.
- Judges should refrain from criticizing other public officials.
- Judges should avoid lending the prestige of office to advance private interests and should not personally participate in the solicitation of funds for any organization or community outreach program. Judges may be the guest of honor at charitable functions.
- Judges should be aware of limitations on gifts and the prohibition against honoraria.

Benefits of Participation

There are significant benefits to be achieved from judicial participation in programs to educate the public and the media about the legal system to. Judicial involvement will help to:

- Build public support for the judiciary;
- Fulfill the public expectation that public officials should be accessible and informative;
- Remedy misperceptions created by the media by both educating the media and communicating directly with the public in educational forums;
- Ensure that people see judges as human beings to improve the perception of the justice system;
- Improve the credibility of the judiciary by serving as a positive role model; and
- Improve public support for the judiciary as a whole and increase individual support for judicial reelection through increased public visibility and understanding.

Suggested Community Collaboration Ethical Guidelines

Based on the authorities contained in Part 2 of this section, the Ethics Compendium, the task force developed the following general guidelines to assist judges in determining their appropriate roles in particular court and community collaboration programs.

1. An intrinsic aspect of the role of all judicial officers is to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
2. Judicial officers should lead and participate in court and community collaboration activities because judges are in a unique position to:
    a. Contribute to public understanding of the legal system and the administration of justice; and
    b. Bring together members of the community to address issues of significant concern to the community.
3. Judicial officers may lead and participate in community collaboration programs as long as they:
    a. Choose an appropriate forum;
    b. Do not comment on pending and impending cases;
    c. Avoid inappropriate comments;
    d. Do not directly solicit outside funding for such programs;
    e. Do not lend the prestige of judicial office to advance pecuniary or personal interests or personal interests of self or others; and
    f. Do not otherwise violate any canons of ethics.
4. Judicial officers can ensure their appropriate participation in court and community collaboration programs by making reasonable efforts to involve court staff, members of the bar, community leaders, or others who can, in appropriate situations, introduce the judge and explain the reasons why the judge cannot make comment, solicit funding, or otherwise engage in prohibited activities.

PART 2. ETHICS COMPENDIUM

This ethics compendium refers to applicable provisions of the California Code of Judicial Ethics ("California Canons"), the ABA Model Code of Judicial Conduct ("ABA Model Code"),[3] and case law and advisory opinions of judicial ethics committees related to each code.

CAVEAT: It is important to remember that the California Code of Judicial Ethics varies from the ABA Model Code in several important respects. The California code is the controlling authority for judges in California. Information regarding the ABA model code and ethics advisory opinions and case law from other states is included for information purposes only and for the use of judges and courts outside of California.

Because the California Canons are the controlling authority for California's judges, those canons are shown in boldface type in the compendium. It is up to each judge to make her or his own determination as to whether any contemplated activity is consistent with the Code of Judicial Ethics. Advisory opinions may be requested from the California Judges Association Ethics Committee by contacting the CJA website at www.caljudges.org or by calling the California Judges Association at 415-495-1999.

Introduction

Both the California Canons and the ABA Model Code encourage judges to speak, write, lecture, teach, and participate in other extrajudicial activities concerning the law, the legal system, and the administration of justice. However, judges have occasionally been disciplined for what they have said when speaking up, particularly to the media, and advisory committees have advised against participating in certain public education efforts. Thus, judges may have questions about their appropriate role or be reluctant to engage in dialogue with the public for fear their comments will fall short of the code and invite disciplinary sanctions.

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[3] "The ABA first adopted a Canon of Judicial Ethics in 1924. The impetus for the Canons apparently was the refusal of United States District Judge Kenesaw Mountain Landis, Major League Baseball's first commissioner, to resign from the court while overseeing America's pastime. Landis remained on the court, earning $7,500 as judge and $42,500 as baseball czar. His activities prompted the 1921 American Bar Association convention to pass a resolution of censure and to appoint a committee to proposed standards of judicial ethics. See J. MacKenzie, The Appearance of Justice 180-82 (1974); Stephen Gillers, Roy D. Simons, Jr., Regulation of Lawyers: Statutes and Standards at 581 (1996). The 1924 Canons drafted by a committee headed by Chief Justice William Howard Taft and consisting of 36 Canons in all, were a mixture of generalized admonitions and specific rules of proscribed conduct. With occasional amendment they served the profession for nearly 50 years and were adopted by most states." Hon. Judith S. Kaye, "Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of the Courts," Howard Lichtentstein Legal Ethics Lecture, Hofstra Law School (1996).

To answer these questions, this analysis is presented in seven sections as follows:

1. Encouraging Judicial Involvement: What Is Permitted?
2. Appropriate and Inappropriate Formats and Forums
3. Commenting on Pending and Impending Cases
    a. Commenting on a Pending Case
    b. A Case Pending Before a Judge
    c. A Case Pending Before a Judge in the Same Jurisdiction
    d. A Case Pending on Appeal
    e. An Impending Case
    f. A Pending Case in Another Jurisdiction
    g. Responding to Criticism About a Case Pending
    h. Exceptions to Rule Prohibiting Comments on Pending or Impending Cases
        i. Explaining Court Procedures
        ii. Scholarly Teaching and Writing
    i. The First Amendment and Ethical Limitations
    j. Commenting When a Case Is No Longer Pending
4. Avoiding Inappropriate Comments
    a. Preserving Impartiality While Speaking Up
    b. Statements on Controversial Issues
    c. Statements on Political Issues
    d. Statements About Lawyers
    e. Expressions of Bias or Prejudice
    f. Speaking to the Appropriate Audience
    g. Speaking to Political Gatherings
    h. Speaking Up About a Problem in the Courts
    i. Accusing Other Judges of Misconduct
    j. Criticizing the Justice System
    k. Criticizing Other Public Officials
5. Lending the Prestige of Office to Advance Private Interests
6. Soliciting Contributions of Money or Goods to Support Court and Community Collaboration Programs
7. Other General Provisions

1. Encouraging Judicial Involvement: What Is Permitted?

". . . [A]s a public servant, a judge has the duty to help educate the public. . . Of all public officials, judges may be the best qualified to perform the task of public education."[4] Two terms — "quasi-judicial" and "extrajudicial" — are often used when discussing these kinds of judicial activities. For purposes of this analysis, the task force defines these terms as follows:

Quasi-judicial activities are all judicial functions that are not part of a judicial officer's adjudicative or administrative duties.

Extrajudicial activities are those which are done, given, or effected outside the course of regular judicial proceedings. Not founded upon, or unconnected with, the action of a court of law.[5]

California Canons: In California, "[j]udges are permitted to engage in certain [quasi-judicial] activities connected with their judicial office that are not related to their adjudicative or administrative duties, provided that these activities (1) do not interfere with the performance of their judicial duties, or (2) do not cast doubt on their capacity to decide impartially any issues that may come before them. These quasi-judicial activities must relate to the improvement of the law, the legal system, or the administration of justice."[6]

Canon 2A specifically provides: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Canon 4 specifically provides: "A judge shall so conduct the judge's quasi-judicial and extrajudicial activities as to minimize the risk of conflict with judicial obligations."

Canon 4A specifically provides: "A judge shall conduct all of the judge's extrajudicial activities so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially; (2) demean the judicial officer; or (3) interfere with the proper performance of judicial duties."

Canon 4B specifically provides: "A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this Code."

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[4] Copple, *From the Cloister to the Street: Judicial Ethics and Public Expression* (1988) 64 Denver U.L. Rev. 549, 578.

[5] *Black's Law Dictionary*, 6th ed. (St. Paul: West, 1990).

[6] David M. Rothman, *California Judicial Conduct Handbook* (San Francisco: California Judges Association, 1990) §195.

Canon 4C specifically provides: "A judge shall not appear at a public hearing or officially consult with an executive or legislative body or public official except on matters concerning the law, the legal system, or the administration of justice or in matters involving the judge's private economic or personal interests."

Canon 4C(3) specifically provides: "Subject to the following limitations and the other requirements of this Code,

- **(a) a judge may serve as an officer, director, trustee, or nonlegal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice provided that such position does not constitute a public office within the meaning of the California Constitution, article VI, section 17;**
- **(b) a judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for profit;**
- **(c) a judge shall not serve as an officer, director, trustee, or nonlegal advisor if it is likely that the organization**
  - **(i) will be engaged in judicial proceedings that would ordinarily come before the judge, or**
  - **(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.**

(Note also the provisions of Canon 5A cited on page 6-37, regarding the significant limitations that apply to judges when considering involvement with political organizations.)

What should be considered?

Judges are free to involve themselves in the public life of their communities so long as that involvement safeguards the uniquely evenhanded and unbiased role that the judiciary must play in a free society. Judges who involve themselves in organizations or governmental boards are required to participate in a manner that maintains the public's confidence in the integrity and impartiality of the judiciary. *California Advisory Opinion 46*, issued by the California Judges Association in 1997, discusses all of the issues that judges must consider in determining their level and type of involvement with organizations. Excerpts from the opinion are quoted below.

> **Factors to be considered in determining whether judicial participation is appropriate include: (1) the extent to which the group engages in political or advocacy activities; (2) the extent to which the group is perceived by the public as engaging in political**

or advocacy activities; (3) the size and public prominence of the organization; (4) whether the issues that concern the group are likely to come before the court; (5) whether the group is concerned with procedural or substantive changes in the law or in the application of the law; (6) whether the judge is participating in a policy making position; and (7) the fundraising activities of the group.

No single one or combination of these factors is necessarily determinative. The ultimate test for judicial participation in such bodies is whether the judge's association with the group, and the necessarily resulting public perception that the judge supports the goals of the group, is likely to lead to a public perception that the judge's impartiality in administering the law may be questioned.

. . . .

In determining whether to join a private organization and/or governmental board, a judge also has an affirmative duty to learn sufficient information about the organization or governmental board so that the judge can determine whether participation would violate the Code of Judicial Ethics. *California Advisory Opinion 46* (1997).

The following examples of permitted and non-permitted activities are cited in *California Advisory Opinion 46*:

- **Membership is permitted in organizations with the following purposes or which engage in identified activities:**
  - **A nonprofit Domestic Violence Council with representatives from the courts, D.A., Pub. Def., County Counsel, police, probation, and the bar association. *Organization's purpose:* to promote public awareness and education about domestic violence and to sponsor an annual conference with the Judicial Council. It does NOT engage in political activity or promote legislation.**
  - **A Commission on Uniform State Laws. *Organization's purpose:* to improve the law and the administration of justice.**
- **Membership is not permitted in organizations with the following purposes or which engage in identified activities:**
  - **Community leader criminal law advocacy organization. *Organization's purpose:* to introduce and endorse legislation making currently legal acts illegal and/or increase penalties for existing criminal acts. Judge may speak**

about and endorse legislation but the legislative activities described call into question the judge's impartiality toward persons who come before the judge charged with violating the supported legislation.

- **Board of Directors of National Legal Services Corporation. *Organization's purpose:* to make policy on highly politicized issues, screen cases, select and monitor attorneys and allocate public funds for services for people who are unable to afford to hire counsel. The local affiliate of the national organization regularly appears in the judge's court. Judge's participation on national board could raise questions about impartiality with cases and attorneys for local affiliate.**
- **Community legislative advisory council. *Organization's purpose:* to discuss events of national and state interest and to update a local legislator about current issues. Participation not permitted because overall appearance is one of non-judicial political activity, which is prohibited under the canons.**
- **Board of Directors of a Local Women's Shelter. *Organization's purpose:* to raise funds for and administer a battered women's shelter. Purpose recently changed to advocating new prosecution policies for District Attorney in domestic violence cases. Judge should not be involved with a group involved in advocating prosecution policies because it would raise questions about the judge's impartiality.**

ABA Model Code: Canon 4B expressly allows a judge to "speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, [and] the administration of justice. . . ." Commentary to this canon describes judges as persons "specially learned in the law" and in a "unique position" and encourages them to "participate in efforts to promote the fair administration of justice, the independence of the judiciary, and the integrity of the legal profession. . . ."

2. Appropriate and Inappropriate Formats and Forums

Appropriate Formats and Forums: In general, judicial ethics advisory committees have approved of judges participating in a wide variety of public education programs, including use of the media.[7] For example:

- Judges may create a speakers bureau and inform service organizations and churches of their availability to present a court-oriented program. *Illinois Advisory Opinion 94-17.*
- A judge may speak to a nonpartisan civic, social, or homeowners association on the role of a county court judge in the judicial system and the improvement of the administration of justice. *Florida Advisory Opinion 77-21.*
- A judge may speak at an open meeting of the Organization for Marriage and Family Therapy to describe court procedures in domestic violence matters. *New Jersey Informal Opinion 22-89.*
- A judge may discuss general reform in the area of bail bonds and may discuss his or her practice in dealing with bail bonds on a televised "guest editorial" program. *Florida Advisory Opinion 81-12.*
- A judge may give a radio interview on an educational program about consumer affairs. *Missouri Advisory Opinion 74* (1982).
- A judge may appear on a television talk show to discuss various legal issues, such as plea bargaining, negligence cases, and small claims court. *New York Advisory Opinion 88-106.* (See, however, page 6-53, No. 5. Lending the Prestige of Office to Advance Private Interests.)
- A judge may act as a moderator for a five-minute, biweekly television program designed to educate the public on the duties and functions of courts. *Texas Advisory Opinion 22* (1977).
- A judge may host a regularly scheduled television show about the law and court procedures. *New York Advisory Opinion 89-146.*
- A judge may participate in a talk radio show that encourages the general public to write to the judge personally with questions, concerns, or comments about the operation of the courts. *New Mexico Advisory Opinion 96-5. (See page 6-53, No. 5.)*

[7] The United States Judicial Conference and more than 35 states have judicial ethics advisory committees to which a judge can submit an inquiry about the propriety of contemplated future action. In some states, the judicial discipline authority is bound by the advisory opinions; in others, evidence that a judge's conduct is consistent with an advisory opinion is considered evidence that the judge acted in good faith if he or she is charged with violating the code of judicial conduct. See *Judicial Ethics Advisory Committees: Guide and Model Rules* (Chicago: American Judicature Society, 1996). **As noted, judges in California may request an advisory opinion from the CJA Ethics Committee. Although not determinative should a later disciplinary proceedings arise, such opinions can provide evidence of good faith.**

- A judge may write a newspaper column that encourages the general public to write to the judge personally with questions, concerns, or comments relating to the operation of the court. *New Mexico Advisory Opinion 96-5.*
- A judge may write a series of articles for a newspaper about juvenile justice and the status of children and families in the state. *Alabama Advisory Opinion 90-396.*
- A judge may write a weekly newspaper column about the law and courtroom procedure. *New York Advisory Opinion 88-133.*
- A judge may write a weekly column about the improvement of the law, the legal system, and the administration of justice. *Texas Advisory Opinion 63* (1982).
- A judge may write a regular or an occasional column for a local newspaper about the function of a county court judge and ways of improving the administration of civil and criminal justice. *Florida Advisory Opinion 77-21.*

Inappropriate Formats and Forums: Judges have been discouraged from participating in certain formats that put the judge at risk of being asked to provide spontaneous or impromptu responses that could compromise his or her impartiality. The issue appears to be the "spontaneous" nature of the responses called for rather than a blanket prohibition on participating. There are methods that can be employed to address the "spontaneity" issue. For example, arrangements could be made to record called-in questions so they could be screened by others to ensure that requests for inappropriate comment are not submitted to the judge.

California Canons: See Canons 4A, 4B, and 4C quoted above at page 6-9 and 6-10. On media appearances, see Rothman, *California Judicial Conduct Handbook*, 220.600 (1990). A judge may be a guest on a radio talk show (220.620, citing 1984 Ethics Update).

ABA Model Code: Two examples of such formats in which judges were advised not to engage in specific activities illustrate the factors a judge should consider in planning educational programs.

Call-in Radio Show: The South Carolina Advisory Committee on Standards of Judicial Conduct concluded that a judge should not participate in a radio talk show in which listeners would call in questions to the judge. *South Carolina Advisory Opinion 14-1991.* The committee was concerned that the spontaneous interchange between the judge and the call-in listener could well affect the dignity of the judge and the office and could interfere with performance of the judicial office, as well as negatively affecting the dignity of other members of the judiciary and the effectiveness of the performance of their judicial duties. The committee specifically noted:

- The judge could find him or herself rendering spontaneous legal opinions on matters that could come before his or her court or may have already come before another court.
- The judge would be in the perilous position of having only partial facts supplied by the caller.
- The judge would be in the undesirable position of offering off-the-cuff advice without time for research or reflection.
- Because judicial expertise on the law is not nearly as comprehensive as the public may believe, the judge could find him- or herself answering or attempting to answer questions in areas where he or she is totally unqualified.
- The judge may find him or herself at odds with callers bent on voicing their complaints with the judicial system; how their cases were handled, the wisdom of the law, the Legislature, and the judge.
- A judge would be in a difficult position if he or she later has to decide an issue on which he or she has already publicly given advice on the talk show.
- The judge's discussion could be viewed as the practice of law. See ABA Model Code Canon 4G.

See also *Louisiana Advisory Opinion 75* (1989) (a judge may host a television program dealing with current legal issues that does not have a call-in portion); *New Jersey Informal Advisory Opinion 23-89* (a judge may not serve as a panelist in public hearings on domestic violence where the open format might require the judge to comment or refuse to comment on issues and might prove embarrassing or damaging to the dignity of the judiciary).

Television Commentator: The Florida Committee on Standards of Conduct Governing Judges advised that a judge could not appear on a news show to comment on legal matters or explain proceedings during high-publicity trials in other courts. *Florida Advisory Opinion 96-25*. The committee cited several considerations, including:

- The judge would be commenting on pending cases.
- In commenting on issues that arise in other courts, "it would be nearly impossible for the judge to avoid injecting his own legal opinion or foreshadowing how he might rule on a contested legal issue," casting doubt on the judge's capacity to act impartially as a judge.
- The judge would be lending the prestige of the judicial office to advance the commercial interests of the television station.
- As recent experience with several high-publicity legal proceedings has demonstrated, issues that come before courts are often not conducive to exposition in the sound-bite format of television news. . . . [T]he commercial and entertainment aspects of a regular judicial appearance on a television news show might well outweigh the legitimate public information aspects, demeaning the judicial office. See ABA Model Code Canon 4A(2).

- Regular appearances on a local television news broadcast could lead to the perception that the judge has priorities other than proper performance of judicial duties. See ABA Model Code Canon 4A(3).
- Members of the electronic media are frequent litigants, and judges must avoid engaging in continuing business relationships with persons likely to come before the court on which the judge serves. See ABA Model Code Canon 4D(l)(b).

See also *New York Advisory Opinion 93-133* (a judge may not make observations about non–New York cases as a commentator on Court TV); *West Virginia Advisory Opinion* (July 23, 1992) (a judge may not continue to serve as legal correspondent for a local television station after assuming office); *In re Broadbelt (1996)* 683 A.2d 543, *cert. denied* (1997) 117 S.Ct. 1251 (a judge may not appear regularly on Court TV to comment on cases pending in other jurisdictions).

3. Commenting on Pending and Impending Cases

3.a. Commenting on a Pending Case

<u>California Canons</u>: Canon 3B(9) specifically provides: "A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Canon does not prohibit judges from making statements in the course of their official duties or from explaining for public information the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity. Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts. This education exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case."

The judge may respond to criticism directed toward judicial procedures, the law or courts generally, as long as the response does not involve the merits of a specific pending or impending judicial proceeding or otherwise comports with the Code of Judicial Ethics. Rothman, *California Judicial Conduct Handbook*, 160.553 (1990). See also *Responding to Unwarranted Criticism,* a recent publication of the California Judges Association.[8]

<u>ABA Model Code</u>: Canon 3A(6) of the 1972 American Bar Association Model Code of Judicial Conduct stated: "A judge should abstain from public comment about a pending or impending proceeding in any court . . ." Concerned that that language was "overboard and unenforceable," the ABA narrowed that provision in the 1990 model code.[9] Thus, Canon 3B(9) of the 1990 model code provides: "A judge shall not, while a proceeding is pending or impending in any court, make any public comment *that might reasonably be expected to affect its outcome or impair its fairness."* (Emphasis added.)

Both versions of the ABA Code also provide that a judge must require similar abstention on the part of court personnel subject to the judge's direction and control. There has been no authority interpreting the change in the code, so it is not clear what effect the addition of the qualification might reasonably be expected to have on a judge's ability to comment on a pending proceeding. See discussions below of commenting on a pending case in another jurisdiction and commenting in scholarly presentations.

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[8] *Responding to Unwarranted Criticism* (San Francisco: California Judges Association 1999).
[9] Milord, *The Development of the ABA Judicial Code* (1992) p. 21.

Not all states have adopted the change in the public comments canon even if they have adopted other provisions of the 1990 model code. Explaining the decision to retain the broad language from the 1972 model code, commentary to the Maine code states that the difficulty of assessing the impact of public comment on an unknown audience justifies the absolute bar. [10]

3.b. A Case Pending Before a Judge

California Canons: Canon 3B(9), as noted above, specifically permits judges to make statements about pending cases in the course of their official duties or in explaining for public information the procedures of the court, and may comment on pending cases in which the judge personally is a litigant. This Canon also permits judges to discuss, in legal education programs and materials, cases and issues pending in appellate courts, so long as the case is not one in which the judge has personally participated, and/or the comments or discussions do not interfere with a fair hearing of the case.

For additional clarification on this matter, see:

- ***Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079.**
- ***Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518.**
- **Commission on Judicial Performance ("CJP") advisory letter sent to a judge for commenting publicly on pending case and appearing to solicit views on sentencing. CJP 1997 Annual Report, p. 23.**
- **CJP advisory letter sent to a judge for making statements to press about attorney's conduct in trial after a mistrial was declared. CJP 1993 Annual Report, p. 18.**
- **"Public comment on a case pending before the judge could affect the outcome in the case and display bias. The need of a judge to comment is not as important as the need to maintain the appearance of fairness and impartiality**

[10] Louisiana and Texas have adopted standards that differ from both the 1972 and the 1990 codes. The Louisiana code states: "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness *or bring the judiciary into disrepute."* (Emphasis added). The Texas code provides: "A judge shall abstain from public comment about a pending or impending proceeding *which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case."* (Emphasis added) **Note: In California, the "might reasonably be expected to affect its outcome or impair its fairness" standard does not apply because California has not adopted the Model Code in this respect. California judges must comply with Canon 3B(9).**

during the pendency of proceedings." Rothman, *California Judicial Conduct Handbook*, 160.550 (1990).

ABA Model Code: Under both the 1972 and 1990 model codes, a judge is clearly prohibited from commenting on the merits of cases pending before the judge, because any such comments could reasonably be expected to affect its outcome or impair its fairness. Comments about a case pending before the commenting judge might (1) give the appearance that the judge has already decided the case, casting doubt on the judge's objectivity and his or her willingness to reserve judgment until the close of the proceeding, or (2) unduly influence or appear to unduly influence the jury.[11] For example:

- A judge was disciplined for discussing with a journalist the progress of a murder trial over which he was presiding, his opinions and reactions to the conduct of participating attorneys, witnesses, and the jury. The judge had known that such discussions, comments, and expressions of opinion, though given "off the record," would be used by the journalist in material that he was preparing for publication. *In re Hayes* (Fl. 1989) 541 So.2d 105.
- A judge was disciplined for talking to a newspaper reporter before a final disposition after the judge ordered two boys detained in family court for psychological exams. Among other statements, the judge had commented to the reporter: "I felt the need to put them in there so they can have the psychological [testing] and so they'll be here. It was either that or go ahead and send them to the Department of Youth Services." *In the Matter of Nice*, COJ 21, Judgment (Alabama Court of the Judiciary, June 21, 1988).
- A judge was disciplined for (1) showing a decision to a newspaper reporter and discussing his rationale before the parties received copies of the decision; (2) informing a newspaper reporter that he planned to vacate an order of contempt (the person held in contempt learned of the judge's intention to vacate the order by reading the newspaper while the validity of the order was pending in the superior court on a petition for writ of habeas corpus); and (3) defending his imposition of a 30-day jail sentence because a defendant requested a jury trial by discussing the pending matter with the press and writing a letter to the editor. *Ryan v. Commission on Judicial Performance* (Cal. 1988) 754 P.2d.
- A judge was disciplined for writing a letter to the editor and a guest editorial published in a local paper that criticized the district attorney. The Oregon Supreme Court found that the letter and the editorial were a direct comment on the quality of prosecution to be expected in pending and impending criminal matters that were to come before him. *In re Schenck* (Ore. 1994) 870 P.2d 185, *cert. denied* 513 U.S. 871.

[11] Ross, *Extra-judicial Speech: Charting the Boundaries of Propriety*, (1989) 2 Georgetown J. Legal Ethics 589.

- **See also *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079.**

In addition to other considerations, under ABA Model Code Canon 3E(l), off-the-bench comments about a pending case made by the presiding judge may disqualify the judge from the case if the comments cast doubt upon the judge's ability to act impartially. **Although disqualification may become necessary, a judge does not avoid the problem, however, simply by disqualification after making the inappropriate remarks. Canon 3B(9) prohibits the comments on pending matters, and California Code of Civil Procedure 170 and Canon 3B(1) create an affirmative duty on a judge to avoid being placed in situations which cause excessive disqualification.**

Examples of comments that resulted in disqualification include:

- Where a judge made critical comments quoted in a newspaper about a particular teachers' strike and stated that he was 'ready to jail more' teachers if the strike was not settled soon, he was disqualified from a case involving that strike. *Papa v. New Haven Federation of Teachers* (Conn. 1982) 444 A.2d 196.
- A judge was disqualified from a custody proceeding when he made several comments to the press and on a national television program that were critical of the reputation, character, and motivation of one of the parties. *Judith R. v. Hey (*W. Va. 1990) 405 S.E.2d 447. The judge was subsequently censured for his remarks.
- A judge's appearance on national television to state his views on continuing protests at abortion clinics, the protesters, and his determination that his injunction against the protests was going to be obeyed would create in reasonable persons a justified doubt about his impartiality and required his disqualification from cases involving the protests. *United States v. Cooley* (10th Cir. 1993) 1 F.3d 985.

3.c. A Case Pending Before a Judge in the Same Jurisdiction

California Canons: See Canon 3B(9) quoted on page 6-17 above.

"[J]udges must avoid the unseemly spectacle of commenting on others' cases. Such comments could affect the result, or be seen by the judge before whom the case is pending as public judicial pressure to decide the case in a certain way. It also undermines public confidence in the decisions of the court." Rothman, *California Judicial Conduct Handbook*, 160.550 (1990).

ABA Model Code: Comments about a case pending before another judge or jury in the same court or jurisdiction as the commenting judge can also be reasonably expected to affect its outcome or impair its fairness or at least create that appearance. A rule prohibiting such comments (1) ensures that proceedings remain immune from outside

influences, even if such influences are not specially prejudicial; and (2) guards against (a) the danger that a judge would feel pressured or would appear to feel pressured by the comments of a peer and colleague, (b) the danger that a jury would accord deference or would appear to accord deference to an opinion expressed by a judge, and (c) the creation of a public impression that citizens are not being treated fairly because different judges may not agree as to how those citizens' rights should be decided under the law.[12]

A judge was reprimanded for statements in a television broadcast about a defendant in two murder cases pending before another judge in the same court, when at the time of the telecast the jury selection in the case had been completed, the trial was in progress, and the jury was not sequestered. The judge had presided over the defendant's first murder trial, which had been reversed on appeal. According to newspaper reports, the judge stated, "[The defendant] does a good job of portraying himself as innocent. I think his first conviction was amply supported by the evidence, and I think that . . . the facts that were brought in that case show that he is a dangerous person." *Press Release Regarding Porter* (Minnesota Board on Judicial Standards, May 28, 1992).

3.d. A Case Pending on Appeal

<u>California Canons</u>: See Canon 3B(9) quoted above on page 6-17.

A judge was disciplined for commenting about a lawsuit while her decision was on appeal. The judge had presided over the jury trial of an action for breach of contract based on the alleged withdrawal by the defendant, actress Kim Bassinger, from the plaintiff 's movie "Boxing Helena," which was completed and released with a different female lead. There was a verdict for the plaintiff, and the defendants filed a notice of appeal. While the appeal was pending, the judge was quoted in a newspaper article as saying, "The fact of the matter is that throughout the trial, a significant portion of my rulings were in favor of Kim." *Public Admonishment of Chirlin* (California Commission on Judicial Performance, August 28, 1995).

A judge imposed a probation condition on defendants in two cases that they not become pregnant and/or that they be implanted with Norplant, a birth control device. While the cases were pending on appeal, the judge granted interviews to magazines, newspapers, and television shows in which he explained and defended his action. He heard a motion for reconsideration in one of the cases following one of his public comments. The Commission on Judicial Performance found that his comments to the media violated the prohibition of 3B(9) (formerly canon 3A(6)) against public comment on cases pending on appeal. The Supreme Court upheld this and other

[12] Ross, *Extra-judicial Speech: Charting the Boundaries of Propriety* (1989) 2 Georgetown J. Legal Ethics 589; *Matter of Benoit* (Me. 1987) 523 A.2d 1381.

findings and imposed public censure. *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079.

In Broadman the court addressed a First Amendment challenge to the prohibition on public comment and held that the standard applied to attorneys — that public comments could be made unless they posed a "substantial likelihood of material prejudice" to a fair trial — did not apply to judges. The court emphasized that a judge's comments have greater effect on public opinion because they are highly visible members of government and are perceived to be neutral arbiters of fact and law, rather than advocates. The state's interest in maintaining public confidence in the judiciary is threatened by comments on a pending case because: (1) if the case is pending before that judge, the public may perceive comments as showing that the judge has prejudiced the merits of the case or is biased toward one of the parties; (2) if the case is pending before another judge, comments may be perceived as an attempt to influence the other judge; and (3) comments may create the impression that the judge has abandoned the judicial role to become an advocate for the judge's own ruling or for a position advanced by one of the parties.

ABA Model Code: Commentary to Canon 3B(9) of the 1990 model code expressly provides that judges are prohibited from commenting on a case that is on appeal, stating that the "requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition."

For example, the New Jersey Advisory Committee on Extrajudicial Activities has forbidden a judge to participate as a panelist for a symposium to discuss a decision authored by the judge and pending before the supreme court. *New Jersey Advisory Opinion 3-88; New Jersey Advisory Opinion 2-88.* The committee's rationale was explained as follows:

- Extrajudicial comments might be used by counsel in their briefs.
- If the judge sought to defend the opinion, the perception of impartiality would be destroyed.
- Commenting on a case to assist the appellate court is tantamount to an amicus curiae brief in support of the judge's own opinion, which is unacceptable.
- The opinion should rest on its own footing without further elaboration.

Continuing the limitation on public comments until appeals are exhausted was implied in the 1972 code, and judges have been disciplined for commenting on cases that were no longer pending before them but were on appeal. For example:

A judge was publicly censured for discussing a child custody case on a nationwide television program while an appeal from his decisions was pending. (Prior to the discipline proceedings, the judge had been disqualified from the custody case as a result of his remarks.) The judge had said, among other things, "My primary concern, and I

want to make this clear, is for the welfare of that child, and I don't think it is in the welfare, the best interests of a child 13 years old to see her mother sleeping with a man that is not her father, and next week there may be a different man in the house, and the third week there may be a third one." *In the Matter of Hey* (W.Va. 1992) 425 S.E.2d 1. (Subsequently, the West Virginia Supreme Court of Appeals held that the judge's remarks were not "judicial acts" for which he would have had absolute immunity from the mother's suit for defamation. *Roush v. Hey* (1996) 475 S.E.2d 299.)

3.e. An Impending Case

California Canons: A judge may respond to criticism directed toward judicial procedures, the law or courts generally, as long as the response does not involve the merits of a specific pending or impending judicial proceeding and otherwise is permissible under the Code of Judicial Ethics. Rothman, *California Judicial Conduct Handbook*, 160.553 (1990).

ABA Model Code: The prohibition on making public comments applies to impending cases as well as pending cases. A case is "impending" if charges are being investigated if someone has been arrested although not yet charged, or if it otherwise seems probable that a case will be filed. For example:

A judge was disciplined for comments to the press related to allegations that more than $8,000 was missing from the court probation department funds, including a statement that the head of the probation department, who presumably would play a key role in the investigation and possible court proceedings, was stonewalling and being less than candid and forthcoming. The Indiana Commission on Judicial Qualifications held that a judge is prohibited from making public comments about the credibility or good faith of a witness in an impending proceeding. *Statement of Admonition of Letsinger* (June 13, 1997).

A judge was disciplined for stating in reference to possible charges that might be filed against a man arrested for abusing his ex-wife, "At the most, this is a third degree assault, at the very most, and it probably won't even be filed, so there was no merit to the claims." The Missouri Supreme Court held that the statement reflected a prejudging of the merits of criminal charges that might be filed without the benefit of investigation, evidence, or argument, revealed an attitude that was a discredit to the judiciary, and could be interpreted as an attempt to influence whether charges would ultimately be brought against the ex-husband. *In re Conard* (1997) 944 S.W.2d 191.

A judge was disciplined for writing a letter to the editor and a guest editorial that criticized the district attorney. The Oregon Supreme Court found that the letter and the editorial were a direct comment on the quality of prosecution to be expected in pending

and impending criminal matters that were to come before him. *In re Schenck* (Ore. 1994) 870 P.2d 185, *cert. denied* 513 U.S. 871.

3.f. A Pending Case in Another Jurisdiction

California Canons: See on page 6-20 of this handbook the comment regarding the "unseemly spectacle" of judges' commenting on other judges' cases quoted from Rothman, *California Judicial Conduct Handbook at I-39* (1990).

ABA Model Code: It might be argued that under the 1990 model code a judge may comment about a pending or an impending case in another jurisdiction because, for example, a California judge or jury is not likely to hear about, much less be affected by, the comments of a New Jersey judge. However, the intent to exempt cases in other jurisdictions from the proscription on public comments is contrary to the retention of the "in any court" language in the 1990 model code revision.

Moreover, even if comments on a case pending in another jurisdiction are arguably not prohibited by ABA Model Code Canon 3B(9), comments on such cases may be prohibited by the ABA Model Code Canon 2A requirement that a judge "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." For example:

- One court has explained that a rule applying to cases pending in any court avoids "the threat to public confidence posed by a judge from one jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction." *In re Broadbelt,* (N.J. 1996) 683 A.2d 543, *cert. denied* (1997) 117 S.Ct. 1251.
- In advising that a judge could not appear on Court TV to identify important legal issues in out-of-state actions and discuss their procedural settings, the New York Advisory Committee on Judicial Ethics stated: "[W]hat constitutes an important legal issue in the particular case being commented on may very well be a subject of dispute between the litigants. . . . Remarks by the judge could thus be seen as lending a judicial imprimatur to legal positions being advanced by one of the parties in an existing legal action, which legal positions may not have yet been ultimately determined. *New York Advisory Opinion 93-133.* The code adopted for New York judges in 1996 affirms that the rule applies to cases in other jurisdictions, adding "any court within the United States or its territories" to its version of the comment restriction.

However, several states have established different rules for a judge's public comments depending on where the case is pending.

- The North Carolina code provides: "A judge should abstain from public comment about a pending or impending proceeding *in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law*." (Emphasis added.)
- The Oregon code provides: "A judge shall not, while a proceeding is pending in *any court within the judge's jurisdiction,* make any public comment that might reasonably be expected to affect the outcome or impair the fairness of the proceeding." (Emphasis added.)
- The Texas code provides: "A judge shall abstain from public comment about a pending or impending proceeding *which may come before the judge's court* in a manner which suggests to a reasonable person the judge's probable decision on any particular case." (Emphasis added.)

See also the discussion below regarding lending the prestige of office to advance the private interest of others.

3.g. Responding to Criticism About a Case Pending

California Canons: A judge may explain court procedures; respond to criticism directed toward judicial procedures, the law, or the courts generally; and give information about the status of the litigation. The judge's remarks must be circumspect and without suggestion of partiality or premature determination. However, the California Judges Association Ethics Committee cautions that a judge should not:

- **Comment on future decisions the judge or another trier of fact may make;**
- **Comment on his or her opinions regarding the credibility of witnesses or the validity of evidence; or**
- **Respond to criticism directed toward the judge on the merits of the litigation.**

The California committee concluded that "criticism directed toward a judge in the context of the merits of pending or imminent litigation is more appropriately answered by a bar association or bar officials." *California Advisory Opinion 24* (1976). See also the comment regarding judicial response to criticism directed toward judicial procedures, the law, or courts generally, discussed in Rothman, *California Judicial Conduct Handbook*, 160.553 (1990), and *Broadman v. Commission on Judicial Performance, supra*, 18 Cal.4th 9.

ABA Model Code: The temptation for a judge to make a comment in a pending case is probably strongest if the judge is publicly criticized about his or her handling of the case. In response to such criticism, a judge may (1) explain court procedures, (2) respond to

criticism directed toward judicial procedures, the law, or the courts generally in regard to litigation, and (3) give information to the public about the status of the litigation.

Recognizing that judges cannot publicly defend themselves against improper criticism, many state and local bar associations have committees that fulfill that purpose. For example, the Committee on Public Comment of the Delaware Bar Association was created "to advise and consult with the President [of the Association] in identifying and framing responses to unwarranted criticisms of members of the judiciary and to matters appearing in the media that affect the legal profession, the judicial system, or the administration of justice," and to assist "in preparing statements in connection with such criticisms and matters on behalf of the Association." See also American Bar Association, *Model Program Outline for State, Local and Territorial Bar Associations: Suggested Program for the Appropriate Response to Criticism of Judges and Courts* (Judicial Division 1998).

The Illinois Judicial Ethics Committee received an inquiry from a judge asking if he could have answered a reporter's questions about a pending child support case in which the judge had increased the reporting requirements for an unemployed father on the grounds that the father was not making an earnest job search. The judge had told the reporter that judicial ethics rules precluded him from commenting, and the reporter's subsequent story stated that the father could not find employment because he spent too much time reporting to the judge on his job search. The committee replied that the judge could not have discussed his reasons for the ruling except to comment on "matters of public record, including reciting without elaboration, any explanation of the judge's ruling that appeared in the transcript of the proceedings or in the court's order." *Illinois Advisory Opinion 96-5.*

The committee made the following recommendations to a judge faced with an inquiry from a reporter:

- "A preferable alternative to responding 'no comment' may be to explain the ethical constraints on a judge's ability to discuss pending cases and to direct the reporter to the location and language of [the relevant provision of the code of judicial conduct]. If the reporter continues to question the extent of the ethical constraints on the judge's ability to comment, consideration should be given to providing the reporter with a copy of [this advisory] opinion."
- "The judge may inform the reporter of the procedure for obtaining a transcript of the proceedings."

The Texas Committee on Judicial Ethics stated that a judge may not respond publicly to unfair criticism of his actions in a case that was still pending. *Texas Advisory Opinion 209* (1997). Critics had alleged that the judge, who was presiding in a massive tort litigation action, was biased because of personal ties to the attorney for the plaintiffs and

suggested that the judge's political interests favored plaintiffs, who resided in the judge's county. The committee noted that it sympathized with the judge's desire to refute unfair or false criticism of his actions and defend his reputation. However, it concluded that a public response to unfair criticism went beyond explaining to the public the court's procedures and was, therefore, prohibited. To engage in an editorial debate with his critics about the merits or motivations of his decision not to recuse himself or his ability to be impartial would place the judge in the position of taking sides outside the courtroom for or against parties urging certain positions inside the courtroom. That is to say that the judge's editorial efforts to defend his impartiality could unwittingly cast further doubt on his impartiality.

A judge asked the Louisiana Supreme Court Committee on Judicial Ethics whether the judge could respond to questions from the press prompted by a citizen's letter published in the local newspaper that contained inaccurate or misleading statements about a ruling or other action by the judge in a pending case. The committee advised that the judge could not respond "except to the limited extent of explaining procedures of the court." *Louisiana Advisory Opinion 144 (1997).* (See discussion below.) The committee stated that such an explanation could include (1) general background information relating to the operation of the court system and (2) an explanation in legal terms of the concepts, procedures, and issues involved. The committee stressed that the judge's primary goal in responding must be to educate the public and to maintain the dignity of the judicial office and cautioned that the judge should avoid personalizing his or her comments and should be objective and dispassionate.

Several other committees have given similar advice in the context of a pending case.

- A judge may not comment publicly about a pending matter in the judge's court despite false, misleading, and inaccurate public statements made by a litigant. *New York Advisory Opinion 94-22.*
- A judge may not discuss issues involving a pending case with a group that was formed as a result of the judge's sentence in the case. *Florida Advisory Opinion 85-9.*
- A judge may not publicly respond to letters to the editor criticizing his or her conduct involving a pending case in which the judge had recused. *Florida Advisory Opinion 85-9.*

3.h. Exceptions to Rule Prohibiting Comments on Pending or Impending Cases

General exceptions to the rule prohibiting comments on pending or impending cases include (1) explaining court procedures, (2) making public statements in the course of official duties, (3) scholarly teaching and writing, and (4) commenting on proceedings in which the judge is a litigant in a personal capacity.

California Canons: See Canons 3B(9) and 4B quoted at pages 6-17 and 6-10 which encompass the exceptions enumerated above.

3.h.i. Explaining Court Procedures:

California Canons: See Canon 3B(9) quoted at page 6-17. Advisory committee commentary to Canon 3B(9) notes that the canon "does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly." It should also be noted that a judge should refrain from using the vehicle of a court hearing to make remarks really intended to influence public opinion. Also see Canon 4B quoted at page 6-10 regarding a judge's role in explaining court procedures in quasi-judicial and avocational activities such as speaking, writing, lecturing, and teaching.

ABA Model Code: As one express exception to the prohibition on making public comments on pending cases, under both the 1972 and the 1990 model codes, a judge may make public statements "explaining for public information the procedures of the court."

To distinguish between impermissible public comments and permissible public explanations, the terminology section of the Georgia Code of Judicial Conduct *prohibits* "valuative statements" such as those that judge: (1) the professional wisdom of specific lawyering tactics or (2) the legal correctness of particular court decisions. The Georgia Code *permits* "generally informative explanations to describe litigation factors" such as (1) the prima facie legal elements of types of cases; (2) legal concepts or principles such as burden of proof, duty of persuasion, innocent until proven guilty, and knowing waiver of constitutional rights; (3) variable realities illustrated by hypothetical factual patterns of aggravating or mitigating conduct; (4) procedural phases of unfolding lawsuits; (5) the social policy goals behind the law being applied in pending cases; and (6) competing theories about what the law should be.

Citing the exception for explaining court procedures, the Tennessee Judicial Ethics Committee stated that a trial judge may speak to groups on subjects related to but separate from the merits of a case while the case was on appeal. *Tennessee Advisory Opinion 89-13.* The case had attracted widespread media attention, and the judge who had presided was invited to speak at civic clubs, school classes, and bar-related functions. The committee explained that a judge could discuss (1) the rules and procedures regulating in-court media coverage of trial proceedings; (2) the basic and fundamental procedures a trial judge is required by law to follow when sitting without a jury; and (3) the general proposition that the personal opinions of the judge or the moral, ethical, theological, and

political views of society should have no part in the decision of the court in a particular case.

Other opinions state:

- A judge may explain the procedures for detaining a witness who refuses to obey a subpoena, but may not speak to the ACLU about a case in which the judge had a recalcitrant witness arrested while a motion for postconviction relief was impending. *Florida Advisory Opinion 96-18.*
- A judge may discuss procedures of the court in general terms for the information of the public, but may not relate trial strategies to a decision in a specific case. *Georgia Advisory Opinion 60* (1984).
- A justice of the peace may answer questions about inquest proceedings prior to a final ruling on a death certificate, but may not discuss the facts or other aspects of the case during the investigation or while the matter is pending. *Texas Advisory Opinion 95* (1987).
- A judge may express an opinion of the actions of a local conditional release commission generally, but should not mention the names of any specific defendants or discuss pending cases. *New York Advisory Opinion 92-67.*
- Citing the exception for explaining the procedures of the court, the Alabama Supreme Court suggested that a judge could (1) explain a case in abstract legal terms; (2) provide background information about the operation of the court system; and (3) explain legal terms, concepts, procedures, and the issues involved in the case. *In the Matter of Sheffield* (1985) 465 So.2d 350. However, an extrajudicial explanation by a judge of his or her ruling is not considered an appropriate explanation of court procedures. For example, in *Sheffield,* the Alabama Supreme Court rejected the judge's argument that his comments to a reporter were merely abstract legal explanations of a pending contempt hearing and a part of his judicial duty. A witness in a case before the judge had written a letter critical of the judge that was published in the local newspaper. The judge issued an order directing the witness to show cause why she should not be held in contempt of court. The evening before the hearing, in a telephone call with the editor of the local newspaper, the judge explained the meaning of constructive or indirect contempt and the possible sanctions for contempt. The judge also said, "The contempt speaks for itself. . . . I think it is pretty obvious who she is talking about." Furthermore, the judge suggested to the editor that "the article [had] false information in it" and that the editor "might want to look at the libel laws; call an attorney." The court found that the judge had violated the restriction on making comments on a pending case.
- The Texas State Commission on Judicial Conduct found that a judge's lengthy interview with reporters explaining his sentence in a case violated the prohibition

on making public comments. *Order of Public Censure (Hampton)* (Texas Commission on Judicial Conduct, November 27,1989). The commission rejected the argument that the judge was merely explaining court procedures. The judge had talked to two reporters while a motion for a new trial was pending in a case in which a defendant had been convicted of killing two men. To one of the reporters, the judge stated: "The victims were homosexuals. They were out in the homosexual area picking up teenage boys. Had they not been out there trying to spread AIDS around, they'd still be alive today. I hope that's clear. [The defendant] is an 18 year old boy. He had 30 years in prison. You know that's a pretty heavy punishment for a kid that's never done anything wrong before. I balance the character of the defendant against the crime he committed. I tried to consider every fact that was presented to me. I've been prosecuting since 1955. Defending, I defended cases 20 years. I've been judging them for seven years and any sentence that I do is a sum total of 33 years' experience in criminal law and it does not upset me if anybody in the Gay Alliance disagrees with me."

The commission condemned the comments because they (1) were lengthy, (2) reviewed the specific details of the case, and (3) formulated or pronounced the rationale for the judge's rulings or findings. The commission explained that to excuse such a discussion "would be to introduce and condone the use of off-record, extra-judicial considerations into the adjudicative process. Perceptions of fairness would decrease and mistrust increase." The commission found that the judge's comments, per se, were destructive of public confidence in the integrity and impartiality of the judiciary, noting that the public had reacted to the judge's comments with disbelief, abhorrence, and indignation. The Texas advisory committee has also stated that a judge's explanation of his or her stated position in a case is not an explanation of court procedures. *Texas Advisory Opinion 191* (1996).

- The Maine Supreme Court held that the exception for explaining for public information the procedures of the court did not justify a judge's defense of sentences that he had imposed, which had been reversed on appeal. *In the Matter of Benoit* (1987) 523 A.2d 1381. The nine cases were remanded for resentencing to the judge who imposed the original sentences. In letters to the editors of four newspapers, the judge criticized the decision vacating the sentences, defended the sentences he had previously imposed, and commented on the facts of the cases and the sentencing factors he had applied. Newspapers throughout the state published his letters. The court concluded: "It is difficult to conceive of a more egregious violation of the plain proscription of Canon 3(A)(6) than that which has occurred in this case. By publishing his letters, the content of which made readily apparent his lack of impartiality, Judge Benoit, at the very least, created the appearance that the judicial system was unfair. More specifically, citizens whose legal rights and freedoms were at risk, were subjected to a public prejudgment of their cases by the

very judge who was assigned to re-impose sentence. We cannot tolerate such a conspicuous display of judicial bias regarding pending cases."

- The Illinois advisory committee stated that a judge should not attempt "to explain an action that he had taken in court with extra-judicial statements that were not a matter of public record." *Illinois Advisory Opinion 96-5.* The committee noted that a judge who discusses reasons for a ruling runs the risk of inadvertently providing information that is not part of the public record and the risk that, even if the judge does not improperly comment on a pending case, the "reporter's accounts of the judge's remarks could give rise to an erroneous appearance that the judge violated the rule." The committee advised the judge to speak with the reporter only if the judge's comments were limited to (1) administrative procedures of the court or (2) matters of public record.
- In *Office of Disciplinary Counsel v. Souers* (Ohio 1993) 611 N.E.2d 305, however, the Ohio Supreme Court found that a judge's defense of his sentencing order, while less than judicious, was provided to publicly explain his procedure in the underlying criminal case and could not be the basis for discipline.

3.h.ii. Scholarly Teaching and Writing:

California Canons: Canon 3B(9) provides: "Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts. This education exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case." Canon 4B specifically provides: "A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this code."

ABA Model Code: Comments made during scholarly presentations on cases pending in other jurisdictions were one category of comments the 1990 model code apparently intended to permit by adopting the "might reasonably be expected to affect [a proceeding's] outcome or impair its fairness" qualification in its revision of the restriction on public comments. The reporter for the ABA committee that drafted the 1990 model code explained that "judges in their extra-judicial teaching and writing often refer to pending or impending cases in other jurisdictions without diminishing the fairness of those cases or the appearance of judicial impartiality."[13] This exception was also implied in the 1972 model code restriction.

Interpreting its provision based on the 1972 model code, the New York advisory committee stated that a judge who teaches a course in criminal justice and related topics

[13] Milord, *The Development of the ABA Judicial Code* (1992) p. 21.

may comment in the classroom on actual cases pending in courts in other jurisdictions. *New York Advisory Opinion 95-105.* The committee reasoned that the provision allowing judges to lecture and teach about the law "obviously contemplate[d] a reasonable degree of academic freedom within the confines of a class room." The committee concluded that "[e]ngaging in discussion with students about current events involving cases being tried in other localities, generally speaking, can in no way negatively impact the criminal justice system." The committee did caution that the judge: (1) should refrain from making gratuitous and unnecessarily controversial statements about pending cases and (2) should avoid any discussion of cases pending within the general jurisdictional locale of the judge's court and the college campus.

Without adopting the "might reasonably be expected to affect [a proceeding's] outcome or impair its fairness" qualification, some states have added an express "education exemption," at least for cases not involving the judge making the comments. For example, the Delaware code and the code of conduct for federal judges add that the proscription does not extend "to a scholarly presentation made for purposes of legal education." The commentary states, "If the public comment involves a case from the judge's own court, particular care should be taken that the comment does not denigrate public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A."

3.i. The First Amendment and Ethical Limitations

The prohibition on commenting on pending cases has withstood constitutional challenges. The decisions acknowledge that judges do not give up their First Amendment rights when they take the bench but stress that those rights can be circumscribed in light of the state's critical interest in an independent and impartial judiciary

California Canons: The basic policies advanced by these limitations are described in Canon 2A quoted at page 6-9, Canon 3, and Canon 4A quoted at page 6-9. See also California case *Broadman v. Commission on Judicial Performance, supra*).

ABA Model Code: Other states have also addressed the relationship between the First Amendment and judicial ethical limitations on speech. For example:

- In response to a judge's challenge to an advisory opinion forbidding the judge from appearing on television to comment on cases pending in other jurisdictions, the New Jersey Supreme Court rejected the judge's argument that the prohibition violated the First Amendment. *In re Broadbelt* (N.J. 1996) 683 A.2d 543, *cert. denied* (1997) 117 S.Ct. 1251. The court applied an analysis that allows the regulation of a judge's speech if it (1) furthers a substantial governmental interest unrelated to suppression of expression, and (2) is no more restrictive than necessary. The court held that avoiding material prejudice to an adjudicatory

proceeding, preserving the independence and integrity of the judiciary, and maintaining public confidence in the judiciary are obviously interests of sufficient magnitude to uphold the restrictions. The court also stated it was satisfied that the restriction on a judge's speech was no greater than necessary.

- In disciplining a judge for criticizing the district attorney, the Supreme Court of Oregon concluded that imposition of a sanction did not violate the judge's freedom of speech. *In re Schenck* (Ore. 1994) 870 P.2d 185, *cert. denied* 513 U.S. 871. The judge had criticized the prosecutor in a letter to the editor and guest editorial, and both were published in a local paper. The court applied an analysis from public employee free-speech cases that weighs the First Amendment rights of a public employee against the interest of the state as an employer in regulating the speech of its employees to promote the efficiency of the public services the state performs through its employees. The court found that the code restriction promoted an interest in protecting both the fact and the appearance of the impartiality and integrity of the judiciary and that that interest is "profound." The court held that the prohibition on making comments on pending cases is a limited restriction on the judge's right to speak that directly related to and was narrowly drawn to further the governmental interest. See discussion of criticizing the justice system later in this appendix.

3.j. Commenting When a Case Is No Longer Pending

California Canons: See Canon 2A quoted at page 6-9 and Canon 3B(9) quoted at page 6-17. Other opinions include the following:

- **A judge is permitted to publicly comment on a higher court's decision when the litigation has concluded. *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 635.**
- **"Nothing in the Code of Judicial Ethics prevents a judge from making a dignified response to public criticism" that does not involve a case pending or about to be brought before the court. *California Advisory Opinion 24* (1976).**

ABA Model Code: A judge may comment about a case the judge has decided after final disposition (including all appeals), although caution is still necessary. For example:

- In referring to a final criminal case, the judge should consider whether the comments might afford a basis for collateral attack. In referring to any final case, the judge should avoid sensationalism and comments that may result in confusion or misunderstanding of the judicial function or detract from the dignity of the judicial office. *U.S. Advisory Opinion 55* (1977).

- The Arizona Judicial Ethics Advisory Committee has stated that a judge may write articles for publication about the reasoning process by which he or she reached a decision in a particular case if the case has been fully resolved. *Arizona Advisory Opinion 95-4.* The committee imposed several conditions based on provisions of the code. The article must (1) be written in a manner that casts no reasonable doubts on the judge's capacity to act impartially (Canon 4A(2)) and (2) promote public confidence in the integrity and impartiality of the judiciary (Canon 2A)). The article must not (1) demean the judicial office (Canon 4A(2)), (2) interfere with the proper performance of judicial duties (Canon 4A(3)), or (3) disclose any nonpublic information about the case that was acquired by the judge in his or her judicial capacity (Canon 3B(ll)).
- In contrast, the Texas advisory committee has stated that a judge may not write a newspaper article discussing his or her position in a case in which the judge participated even though the case had been finally resolved. *Texas Advisory Opinion 191* (1996). That committee stated: "Even though a matter has already been decided it can be revisited and the opinion/editorial would be talking about more than just particular procedures of the court." (The Texas code prohibits public comment that "suggests to a reasonable person the judge's probable decision on any particular case." However, that difference between the model code and the Texas code does not seem to affect the reasoning of the advisory committee.) Further, as the request was from an appellate judge, the opinion cited a unique provision in the Texas code that provides: "The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court-approved history project."
- The New Jersey advisory committee has also stated that a judge should not "clarify, defend, or justify any of the judge's decisions or opinions, or reasoning therein even in the absence of an appeal." *New Jersey Guidelines for Extrajudicial Activities, III.A.2.b.*
- A judge who had been the subject of a negative letter to the editor about a case that was no longer pending asked the New York advisory committee if he could respond. *New York Advisory Opinion 92-13.* Entitled "System Is Frustrating," the letter published in a local newspaper was critical of a court system where "judges and lawyers get together and decide who is right and who is wrong before they know the whole story." It also stated that the "whole country is slowly going down the tube and people of the judicial system don't care." The article did not identify by name any particular case or judge, but the inquiring judge knew which case the letter referred to by the names of the writers. The judge wanted to respond in a letter indicating that the author's statements were "completely false and unfounded, since both parties were represented by counsel, a fact-finding was held

at which the parties testified under oath, there never was a pretrial conference with or without the parties, and the entire matter is on the record." The committee advised that, because the case was no longer pending, the judge was at liberty to publicly correct any of the procedural misconceptions in the letter. However, the committee warned that the judge must: (1) scrupulously avoid personalizing the comments, (2) refrain from invective, and (3) be objective and dispassionate so as not to detract in any way from the dignity of the judicial office. In addition, the committee stated that "[w]hile no ethical objection . . . is apparent to the judge's answering, the Committee considers this an unwise course," noting that a "judge must expect to be the subject of public scrutiny and, therefore, must accept criticism, however meritless, that might be viewed as opprobrious by the ordinary citizen."

- *Alabama Advisory Opinion 97-649* states that a trial judge should not explain the rationale for a sentence imposed in a criminal case to a critic of that sentence even if the time for an appeal has expired and the judge is willing to recuse from any postconviction petition brought by the defendant.

4. Avoiding Inappropriate Comments

4.a. Preserving Impartiality While Speaking Up

California Canons: See Canon 4A quoted on page 6-9.

Canon 2B(1) provides: "A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge."

Canon 5 provides: "Judges are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, avoid political activity that may create the appearance of political bias or impropriety. Judicial independence and impartiality should dictate the conduct of judges and candidates for judicial office."

Canon 5A provides: "Judges and candidates for judicial office shall not (1) act as leaders or hold any office in a political organization; (2) make speeches for a political organization or candidate for nonjudicial office or publicly endorse or publicly oppose a candidate for nonjudicial office; (3) personally solicit funds for a political organization or nonjudicial candidate; or make contributions to a political party or political organization or to a nonjudicial candidate in excess of five hundred dollars in any calendar year per political party or political organization or candidate, or in excess of an aggregate of one thousand dollars in any calendar year for all political parties or political organizations or nonjudicial candidates."

Canon 5B provides: "A candidate for election or appointment to judicial office shall not (1) make statements to the electorate or the appointing authority that commit or appear to commit the candidate with respect to cases, controversies, or issues that could come before the courts, or (2) knowingly misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or his or her opponent."

Canon 5C provides: "Candidates for judicial office may speak to political gatherings only on their own behalf or on behalf of another candidate for judicial office."

Canon 5D provides: "Except as otherwise permitted in this Code, judges shall not engage in any political activity, other than in relation to measures concerning the improvement of the law, the legal system, or the administration of justice."

ABA Model Code: Like all of a judge's off-the-bench activities, a judge's public education efforts should not "cast reasonable doubt on the judge's capacity to act impartially as a judge." Canon 4A(l). This requirement narrows the statements a judge

can make on controversial issues, proscribes a judge's participation in campaigns regarding political issues, limits the statements a judge can make about lawyers, prohibits a judge from exhibiting bias or prejudice, and limits the types of audiences to which a judge can speak.

4.b. Statements on Controversial Issues

California Canons: "It is inappropriate for a judge to become publicly involved in measures that pose political questions having no relationship to improvement of the law, the legal system or the administration of justice." Rothman, *California Judicial Conduct Handbook*, 240.610 (1990). See Canon 5 quoted at page 6-36.

ABA Model Code: Although judges are encouraged to work toward "revision of substantive and procedural law and improvement of criminal and juvenile justice," they have also been cautioned against "indiscriminately voicing their objection to the law lest they be misunderstood by the public as being unwilling to enforce the law as written, thereby undermining public confidence in the integrity and impartiality of the judiciary."

For example, in 1980, Judge William C. Gridley of Florida wrote an article for his church newsletter and two letters that were published in a local newspaper. For example, the article in the church newsletter stated: "Because God has given me a new life in Jesus Christ, I choose not to condone our use of capital punishment. I am not saying that I would refuse to impose capital punishment if I as a judge were required legally by our society to do so. A judge is in a particularly sensitive position because it is his duty to render a judgment on facts, which legally compel the imposition of the death penalty. But even as he judges and imposes capital punishment, the judge in his capacity as an individual citizen can express dissent from the course of action taken by the state." The Judicial Qualifications Commission found that the judge's writings violated the requirement that a judge act in a manner that promotes public confidence in the impartiality of the judiciary. *In re Gridley* (Fl. 1982) 417 So.2d 950.

In response, the Florida Supreme Court held that "a judge in an appropriate forum may express his protest, dissent, and criticism of the present state of the law." The court noted that there are "many authorized methods of protest, dissent and criticism within the framework of the judiciary." The court listed dissenting opinions, petitions to the Supreme Court for changes in the rules of procedure, submission of suggested changes to various committees of the bar association, participating in legal seminars conducted by the bar association, and taking an active part in state and local conferences of judges. Three justices, writing in a concurrence, went further and argued that a judge's forum for expressing his or her views is not limited to the judicial and legal communities as suggested by the majority opinion but that there are "times and issues" that will compel judges to speak out to a "much larger community through other mediums."

However, the court held that in voicing his or her opposition to the law, a judge: (1) must not appear to substitute the judge's concept of what the law ought to be for what the law actually is and (2) must express himself or herself in a manner that promotes public confidence in the judge's integrity and impartiality as a judge. The court emphasized that most judges "would not have expressed their dissent in the same manner as Judge Gridley because, even if this conduct did not violate the Code of Judicial Conduct, they would have considered it to be in poor taste and subject to possible misinterpretation by the public." However, the court concluded that, while Judge Gridley had come "close to the dividing line between what is appropriate and what is not," he had stopped short of violating the code because he had "made it clear that he was duty bound to follow the law and that he would do so although he did advocate law reform in the area of capital punishment."

In contrast, the dissent in *Gridley* concluded that, despite the judge's commitment to follow the law regardless of his personal feelings about capital punishment, "no reasonable person could read Judge Gridley's letters or article and still realistically believe that the judge would actually impose a death sentence. . . ."

Other authorities restrict judges' discussion of controversial issues, apparently unpersuaded that a judge can debate such topics while maintaining the appearance of impartiality. For example:

- The Indiana Commission on Judicial Qualifications has explained that "while it is true that most judges will harbor personal views on [abortion] but will nonetheless rule with impartiality, the public perception of impartiality is as important as impartiality in fact, and it is crucial that a judge not appear to have cleaved to a position." *Indiana Advisory Opinion 2-90.* Thus, the commission stated that a judge may not publicly express personal views on the issue of whether abortion is "right or wrong."
- To preserve the appearance of impartiality, the Washington Ethics Advisory Committee imposed several caveats on the permission it granted a judge to address a symposium on domestic violence. *Washington Advisory Opinion 97-10.* Although the committee stated that the judge could address the symposium to give a judicial perspective on the impact of domestic violence cases on the court, it also cautioned that the judge should not (1) speculate on what the law should be, (2) speculate on how the law could be improved in particular cases, (3) act as an advocate, or (4) give an impression of how he or she might rule in a particular case.
- The Florida committee gave comparable cautions when it stated that a group of judges could meet with concerned citizens to discuss sex-related misdemeanors that the citizens perceived to be a significant community problem. *Florida Advisory Opinion 94-09.* The committee warned the judges to "avoid committing

themselves to a decided course of legal action in specific types of cases certain to come before them."

Other advisory committees have stated:

- A judge may not publicly advocate handgun control. *Florida Advisory Opinion 93-64.*
- A judge may present a speech on the history of the death penalty to a nonpartisan political organization where the speech is neither pro–death penalty nor anti–death penalty. *Florida Advisory Opinion 95-3.*
- A judge should not become involved in a political or controversial issue or appear to advocate or be identified with a particular position on a controversial issue. *New Jersey Guidelines for Extra-Judicial Activities, IIIA(2)(e).*

The Illinois advisory committee has given judges permission to discuss a wide variety of controversial issues as long as they do not cast doubt upon their ability to decide impartially any case that may come before them, although without more precise guidance on how to avoid that hazard. *Illinois Advisory Opinion 94-5, Illinois Advisory Opinion 94-17.* With that caveat, the committee advised that judges could publicly discuss abortion; the death penalty; a proposed "three-time loser" law; proposed or enacted legislation; local government issues, such as bond issues and school district tax referendums; gun control; and merit selection of judges. The committee warned that it was advisable but not mandatory for judges discussing controversial issues to state affirmatively that regardless of their personal views they would follow the law if called upon to decide any of those issues.

In the context of judicial election campaigns, in the 1990 ABA Model Code a prohibition in Canon 5A(3)(d)(ii) on a candidate's making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court" has withstood constitutional challenge. *Ackerson v. Kentucky Judicial Retirement and Removal Commission* (W.D. Ky. 1991) 776 F.Supp. 309; *Deters v. Judicial Retirement and Removal Commission* (Ky. 1994*)* 873 S.W2d 200, *cert. denied,* 513 U.S. 871. That provision from the 1990 model code gave judges more leeway to discuss controversial issues in judicial election campaigns than had the 1972 model code. Canon 7B(c) of the 1972 model code had prohibited a judicial candidate from "announc[ing] his views on disputed legal or political issues." That provision, as adopted in several states, had been declared unconstitutional. See, e.g., *Buckley v. Illinois Judicial Inquiry Board* (7th Cir. 1993) 997 F.2d 224. The ABA believed that the broad language of the 1972 code's version of the rule "could not be practicably applied in its literal terms" and that the 1990 revision was "more in line with constitutional guarantees of free speech." Milord, *The Development of the ABA Judicial Code* (1992). p. 50.

4.c. Statements on Political Issues

California Canons: Canon 5C quoted at page 6-36 directly prohibits judges from making public statements on political issues. Among other things, such statements can raise questions of the judge's impartiality. For example, the CJP sent an advisory letter to a judge for public support of an official accused of misconduct, although the official and the official's staff regularly appeared before the judge. CJP 1997 Annual Report, p. 23.

ABA Model Code: Another ethical limitation on a judge's speech is found in Canon 5D regarding political conduct. It prohibits a judge who is not currently a candidate for office from engaging in any political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

Under this rule, a judge may not:

- Speak on the merits of an initiative measure that is intended to provide additional funds for children's services by means of a tax increase *(Washington Advisory Opinion 89-11);*
- Join a group of citizens to encourage the passage of a school levy *(Washington Advisory Opinion 95-3);*
- Address a rally for an anti-abortion organization that is pursuing a political agenda *(In re Sanders*, No. 96-2173-F-63, Commission decision (Washington Commission on Judicial Conduct May 12, 1997) (being appealed to state supreme court); or
- Speak publicly in opposition to a bond issue that had nothing to do with the administration of justice *(In re Chambliss* (Miss.1987) 516 So.2d 506).

However, under the exception for law-related issues, a judge can take a stand on a plan to change the way judges are chosen, although how judges are chosen is obviously a political issue. *Arkansas Advisory Opinion 94-4; Florida Advisory Opinion 80-14; Kansas Advisory Opinion JE-5* (1984); *Kansas Advisory Opinion JE-5A* (1984); *Ohio Advisory Opinion 87-44.* Furthermore, under that exception, a judge may:

- Comment on the need for additional funds to improve the law, the legal system, or the administration of justice *(Washington Advisory Opinion 89-11);*
- Express an opinion about a sales tax to finance improvements to the county jail and courthouse *(Ohio Advisory Opinion 87-44);*
- Campaign on the question of splitting a judicial district into two districts (*Louisiana Advisory Opinion 24* (1975));

- Take a public stand in favor of or opposed to a bond election in which voters will decide whether to increase the sales tax to pay for a new courthouse and jail *(Arkansas Advisory Opinion 94-1);*
- Take a public stand on a proposed constitutional amendment that would impose limits on judicial terms *(Arkansas Advisory Opinion 94-4);*
- Participate in campaigns for or against initiatives concerning juvenile justice reform *(Arizona Advisory Opinion 96-8);* and
- Criticize the legislature for cutting state court budgets (*Judicial Inquiry Commission v. McGraw* (W. Va. 1983) 299 S.E.2d 872).

4.d. Statements About Lawyers

California Canons: See Canon 1 quoted at page 6-57 and Canon 2A quoted at page 6-9. Judges making disparaging statements about lawyers can negatively affect the public's perception of the administration of justice. A judge was disciplined for making public statements disparaging certain attorneys and judges. *In re Velásquez,* Commission Decision and Order of Public Censure, CJP 1997 Annual Report, pp. 16–17. See also Canon 3D(2), which requires a judge to take corrective action whenever he or she has personal knowledge that a lawyer has violated any provisions of the Rules of Professional Conduct.

ABA Model Code: The competence, or lack of competence, of lawyers is "fair game for judges, particularly if the remarks are limited to lawyers generically." *Illinois Advisory Opinion 94-17.* However, the Illinois committee cautioned that "unflattering comments about a specific lawyer would be more problematic," as such comments "could cast doubt on the speaker's ability to decide impartially cases involving that lawyer."

In *In re Schenck* (Ore. 1994) 870 P.2d 185, *cert. denied* 513 U.S. 871, the Oregon Supreme Court found that a judge violated the code of judicial conduct by writing a letter to the editor and a guest editorial published in a local paper that criticized the district attorney. For example, the editorial was an extended essay on the district attorney's lack of competence, experience, professional demeanor, and personal maturity, citing specific instances in identifiable cases as well as general matters. The court concluded that after those broadsides, the public reasonably might question the judge's impartiality in any matter involving the district attorney.

4.e. Expressions of Bias or Prejudice

California Canons:

Canon 3B(5) specifically provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status."

Derogatory or offensive remarks may diminish the community's regard for a judge and for the judicial system, regardless of the speaker's subjective intent or motivation. *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 376–77.

The administration of justice is prejudiced by the public perception of racial bias, whether or not it is translated into the court's judgments and orders. *In re Charles S. Stevens* (1982) 31 Cal.3d 403, 405.

ABA Model Code: Whenever judges speak on any issue, they must be careful to refrain from insensitive and stereotyped statements. Commentary to Canon 4A explains that expression of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Such expressions include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. For example:

- A judge was publicly censured for expressing, in an interview with a newspaper reporter, his displeasure with a state statute regulating abortions for minors and stating that one of the circumstances in which he might permit a minor to have an abortion pursuant to the act would be when a white girl was raped by a black man. *In the Matter of Bourisseau* (Mich. 1992) 480 N.W.2d 270.
- A judge was removed as chief judge for remarks to a reporter about public schools, the provocative dress of female students, the prevalence of blacks on welfare and in the criminal justice system, and the propriety of making racial slurs and telling racial jokes in private. The Florida Supreme Court held that because a significant portion of the community had read the judge's statements as endorsing discriminatory stereotypes that were inimical to the law of Florida and the interests of the judiciary, his actions had significantly eroded his ability to work effectively with all segments of the community. *Petition for Removal of a Chief Judge* (Fl. 1992) 592 So.2d 671. The judge was subsequently reprimanded for the same remarks. *In Re Santora* (1992) 602 So.2d 1269.

4.f. Speaking to the Appropriate Audience

California Canons. See Canons 4A, 4B, and 4C quoted at pages 6-9 and 6-10. A judge may speak to service organizations or any group he or she chooses as long as there is no fundraising or political purpose and the subject matter of the speech is within the limitations of the Code of Judicial Ethics. See specifically, Canon 4C(3)(d)(iv). For example, a judge may accept an invitation from a law firm to speak at a meeting or dinner training session if the judge speaks on a subject that qualifies the meeting as legal education, is available to all law firms for similar lectures, and avoids repetitive visits to the same law firm. *California Advisory Opinion 29* (1983).

ABA Model Code: Concerns about maintaining a judge's impartiality may limit the type of audience appropriate for a judge's education efforts. Therefore, prior to agreeing to a speaking engagement, a judge should consider the nature of the organization and whether speaking to the group may tend to identify the judge with the aim or purpose of the organization. (Judges cannot speak at fundraising events. Commentary to Canon 4C(3)(b).) See, however, the rule in California as set forth on page 6-55.

In *Washington Advisory Opinion 93-19* the relevant factors to be considered in assessing the nature of the organization include whether the organization:

- Advocates positions on disputed issues;
- Regularly engages in adversarial proceedings in court;
- Files amicus briefs on disputed issues;
- Endorses non-judicial political candidates;
- Subscribes to a particular legal philosophy or position that implies commitment to causes that may come before the court for adjudication;
- Is devoted to the improvement of the law, the legal system, or the administration of justice; and
- Serves a primarily social function.

Advisory committees have suggested that addressing an organization can constitute an identification with that organization's positions and, therefore, is prohibited if such an identification compromises a judge's impartiality. For example:

- A judge who presides over domestic violence cases may not speak at an event for a battered women's advocacy group if the organization is partisan, but may if it is service-oriented. *Illinois Advisory Opinion 93-4.*
- A judge may give an address on how juvenile cases are handled to a group that studies juvenile justice but not to an advocacy group. *West Virginia Advisory Opinion* (December 11, 1997).
- A judge who presides over criminal cases should not be an honoree at a dinner of the Fraternal Order of Police if that organization is controversial and advocates

particular positions on issues coming before judges. *Illinois Advisory Opinion 93-4.*

- A judge may not accept an invitation from Mothers Against Drunk Driving (MADD) to speak at a dinner honoring the law enforcement officers who issued the most driving-under-the-influence (DUI) citations in the past year. *Washington Advisory Opinion 95-8.*
- A judge may not speak at a club's annual recognition and awards luncheon where the club gives monetary and other assistance to police officers and fire fighters and the expected audience consists of members of the club, law enforcement professionals, and others. *New Jersey Informal Advisory Opinion 16-93.*
- A judge may not speak on the judiciary's approach to issues affecting children at a conference for foster parents because foster parents have an interest in cases of termination of parental rights. *New Jersey Informal Advisory Opinion 26-93.*
- A judge may not speak on the topic, "The Role of MADD and the Court System" because to do so would cast doubt on the judge's capacity to decide impartially DUI issues that may come before the judge. *Washington Advisory Opinion 96-9.*

In contrast, in one opinion, the Illinois committee concluded that merely addressing an organization is not an implicit endorsement of the organization or its agenda. *Illinois Advisory Opinion 94-17.* Thus, that committee has stated that judges are free, as long as they do not say anything that casts doubt on their impartiality, to speak before groups, such as court watchers or MADD, that advocate new legislation or changes in the enforcement of existing laws.

Some advisory opinions caution judges about speaking to law firms. For example:

- The New Jersey advisory committee has cautioned judges against educating or being perceived as educating "a special interest group to the disadvantage of any other group." The committee has stated that a judge should not accept speaking invitations from law firms and others that frequently appear in court. *New Jersey Advisory Opinion 1-89.* See also *U.S. Compendium, § 4.l(f)* (1995)[14] ("it is impermissible for a judge to participate in training lawyers at a particular law firm").
- *Maryland Advisory Opinion 116 (1988)* and *California Advisory Opinion 29* (1983) have stated that a judge may accept invitations from law firms to speak at meetings or dinner training sessions if the judge:
    - Speaks on a subject that will qualify the meeting as legal education,
    - Is available to all law firms for similar lectures, and
    - Avoids repetitive visits to the same law firm.

[14] The U.S. Compendium is an accumulation of advisory opinions issued for federal jurists by the United States Judicial Conference, Advisory Committee on Judicial Activities, and is available through the Administrative Office of the United States Courts in Washington, D.C. 20544

Several advisory committees have stated that a judge may not teach law enforcement officers. For example:

- The New York committee stated that a judge should not give a seminar on how to successfully prosecute certain traffic cases to police officers who act as prosecutors in such traffic cases. *New York Advisory Opinion 95-12* 1. The committee reasoned that, in effect, the judge would be advising the prosecution how to obtain convictions.
- The Utah Ethics Advisory Committee stated that a judge may not teach law enforcement officers about proper courtroom demeanor and testimony because such a course would be devoted not to the improvement of the legal system overall, but to the improvement of a single adversarial component. *Utah Advisory Opinion 88-5.* See also *Nebraska Advisory Opinion 96-9* (a judge may not write an occasional column for a local newspaper that is published by law enforcement officers primarily for law enforcement officers). But see *Missouri Advisory Opinion 121* (1985) (judge may speak at training session for police officers to discuss problems that arise in driving-while-intoxicated cases and steps police may take to better prepare cases); *Washington Advisory Opinion 92-1 0* (a judge may participate in seminar sponsored by state toxicologist to provide prosecutors with information about breath and alcohol testing).

4.g. Speaking to Political Gatherings

California Canons: Canon 5 specifically provides that a judge or judicial candidate shall refrain from inappropriate political activity. Specific subsections of Canon 5 direct as follows:

Canon 5A(2) directs: "Judges and candidates for judicial office shall not make speeches for a political organization or candidate for nonjudicial office or publicly endorse or publicly oppose a candidate for nonjudicial office."

Canon 5C provides: "Candidates for judicial office may speak to political gatherings only on their own behalf or on behalf of another candidate for judicial office."

Canon 5D provides: "Except as otherwise permitted in this Code, judges shall not engage in any political activity, other than in relation to measures concerning the improvement of the law, the legal system, or the administration of justice."

ABA Model Code: Although, in general, a judge who is not a candidate for re-election or retention may not speak at political gatherings (Canon 5A(l)(d)), in some states there is an exception to that rule that allows a judge to attend political gatherings to speak about the justice system.

Several advisory committees have crafted guidelines regarding judges' addressing political gatherings. *Washington Advisory Opinion 95-7; Washington Advisory Opinion 98-1; Georgia Advisory Opinion 1 (1976); Arizona Advisory Opinion 76-1.* Those guidelines are:

A judge may speak to political organizations, including partisan organizations, on nonpartisan topics such as:

- The role of the judiciary,
- The problems the judiciary faces, or
- The dispute resolution process in general.

A judge's appearance is appropriate as long as:

- The judge does not answer any questions involving issues that might come before the judge;
- The judge does not endorse any candidate, legislation, or proposition that might be the subject of voter action;
- The political function is intended to be educational, not a partisan event such as a rally or convention;
- The judge will not be present for any portion of any business meeting;
- The judge's appearance will not be announced to the general public, although the members of the organization may be informed of the judge's address beforehand;
- The judge's speech will not give the appearance that the judge is supporting a particular candidate; and
- The judge's speech will not violate the prohibition against judges' actively taking part in any political campaign other than their own.

However, not all states approve of judges' speaking to political gatherings about the justice system. The Florida committee, for example, stated that a judge may not accept an invitation to speak before a local partisan political meeting for the purpose of explaining and discussing the new judicial system. *Florida Advisory Opinion 74-3.* Noting that a judge should not use, or appear to use, the judicial position on behalf of any political party, the committee stated, "There is a question of 'how educational the educational talk would be' or appear to be." See also *New York Advisory Opinion 88136* (a family court judge who is not running for election may not speak to a political club about the function of the family court).

4.h. Speaking Up About a Problem in the Courts

<u>California Canons</u>: See California Canon 2A quoted at page 6-9.

ABA Model Code: Although drawing the public's attention to a problem in the courts may undermine public confidence in the judiciary candid discussion may, under some circumstances, actually reassure the public that the judiciary is aware of and addressing problems, rather than ignoring them. One court has distinguished between constructive criticism and destructive criticism. Constructive criticism "is likely to be, in its ultimate result, beneficial to the community which [the judge] serves." *In re Kelly* (Fl. 1970) 238 So.2d 565, *cert. denied* (1971) 401 U.S. 962. "Destructive criticism raise[s] suspicion of motives among the judges, and renders the courts all suspect to the public, [and] the result can only be an increase in disrespect for law and order, an increase in lawlessness, a greater tendency among some of our citizens to let loose their tendencies to disorder. Thus, no absolute ethical prohibition prevents a judge from thoughtfully criticizing other judges or the justice system, although it is not encouraged, and unprovoked, disrespectful attacks are not condoned." [15]

4.i. Accusing Other Judges of Misconduct

California Canons: Canon 3D provides: "(1) Whenever a judge has reliable information that another judge has violated any provisions of the Code of Judicial Ethics, the judge shall take or initiate appropriate corrective action, which may include reporting the violation to the appropriate authority. (2) Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action. (3) A judge who is charged by prosecutorial complaint, information, or indictment, or convicted of a crime in the United States, other than one that would be considered a misdemeanor not involving moral turpitude or an infraction under California law, shall promptly and in writing report that fact to the Commission on Judicial Performance."

- **The California Commission on Judicial Performance has noted that it, not the news media, is the appropriate forum if a judge wanted to make allegations of misconduct against other judges and that a judge's report to a conduct commission is absolutely privileged. The Commission disciplined a judge, who**

[15] Judges who are lawyers are also required to comply with their jurisdictions' version of Rule 8.2 of the ABA Model Rules of Professional Conduct, which prohibits a lawyer from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

Criticism of judicial opponents in an election campaign is beyond the scope of these materials. See *Advisory Opinions Set Limits on Campaign Speech*, Judicial Conduct Reporter 18 no. 2 (Summer 1996): p. 22; *Campaign Ad Earns Reprimand for Ohio Judge*, Judicial Conduct Reporter 18, no. 4 (Winter 1997): *Judicial Campaign Ads Violate Code of Conduct*, " Judicial Conduct Reporter *19, no. 1 (* Spring 1997): p. 25.

consented to the censure, for making public statements disparaging fellow judges during a dispute about the judge's "get tough" sentencing policy in DUI cases. The judge's statements were made both on and off the bench, in open court, in documents filed in court, in newspapers, and on television broadcasts. *Inquiry Concerning Velasquez,* Decision and Order Imposing Public Censure (California Commission on Judicial Performance, April 16, 1997).

ABA Model Code: The Indiana Commission on Judicial Qualifications has stressed that a judge will not be disciplined for speaking publicly about a difficult situation in the courts as long as the judge's comments (1) are temperate and judicious, (2) contain fact-based information from which the public could benefit, and (3) do not create an unfairly negative perception of the judiciary. *Statement of Admonition of Letsinger* (June 13,1997). However, the commission publicly admonished Judge Letsinger, pursuant to his consent, for commenting to the press about allegations that over $8,000 was missing from the court probation department funds. Among other comments, the judge stated that one of his colleagues was being less than candid and forthcoming relating to the investigation and had prior knowledge about problems with missing funds. He said about the other judge, "He knew about this. The can of worms is starting to smell, and it's smelling higher and higher," and he said that the other judges on the court were protecting the judge.

The commission found that the judge's comments were intemperate and injudicious and not fact-based information from which the public could benefit. The commission stated that his comment about the "can of worms smelling higher and higher" created "an inflammatory association between his colleague and a somewhat unclear but distinctly negative circumstance involving the investigation into the missing funds." The commission noted that if Judge Letsinger believed that other judges were acting inappropriately, he should report them to the commission, not make unconstructive comments to the press. See Canon 3D(l).

Some courts and conduct commissions have adopted a suggestion from the dissent in *Kelly* that a judge who has been publicly attacked by colleagues has "a kind of 'qualified privilege,' to borrow a phrase from the law of libel, to publicly explain his side of the affair." *In re Kelly* (Fl. 1970) 238 So.2d 565 (Ervin, C.J., dissenting), *cert. denied* 401 U.S. 962 (1971). See *In re Miera* (Minn. 1988) 426 N.W.2d 850; *In re Conard* (Mo. 1997) 944 S.W.2d 191; *In re Lange,* No. 95-66, Dismissal (Minnesota Board on Judicial Standards, November 26,1996). However, this privilege is limited and excuses a judge's conduct only if the response (1) is provoked; (2) is not an inappropriate comment on a pending or impending case; (3) does not reveal an attitude that is a discredit to the judiciary; (4) is in moderate, unmalicious, respectful, and unabusive language; (5) avoids profane and personal attacks; and (6) has a reasonable factual basis.

4.j. Criticizing the Justice System

ABA Model Code: The Florida Supreme Court has disciplined two judges for sweeping attacks on the administration of justice in their jurisdictions. In *Inquiry Concerning Miller* (Fl. 1994) 644 So.2d 75, the judge had written to the editor of a local newspaper two letters that criticized the criminal justice system. For example, the judge wrote: "The plain truth of the matter is that rather than alter a system that has now proven without a doubt to be incapable of dealing with crime, our society has altered itself and ignored the problem by sticking our heads in the sand like the proverbial ostrich until he wound up in the belly of the lion."

The Judicial Qualifications Commission had found that the letters "called into question the impartiality of Judge Miller to try criminal cases." The court agreed, holding that, although the judge indicated in his writings that he would uphold the law, "it is nonetheless apparent that some of his comments could be interpreted as making him less than impartial."

In a second case, a judge was reprimanded for filing a public petition in the Supreme Court that stated, for example, that "virtually every phrase of the criminal administration at the present time is burdened with inefficiency." *In re Kelly* (Fl. 1970) 238 So.2d 565, *cert. denied* (1971) 401 U.S. 962. The judge also argued that any suggestion to improve administration was met with "crisis, controversy and ill-will among judges."
However, after one judge stated that a case in which a defendant had held his wife hostage at gunpoint for two hours was not a criminal offense but should be in divorce court, the Illinois committee advised the other judges in the jurisdiction that they could clarify the court's philosophy of the law and procedures in the area of domestic violence. *Illinois Advisory Opinion 94-8.* The judges wanted to speak out to assure the public that they did not accept that outdated approach to domestic violence and that they were strongly behind the laws prohibiting such crimes.

The First Amendment protects a judge's truthful public statements critical of the administration of the judicial system. *Scott v. Flowers* (5th Cir. 1990) 910 E2d 201. Judge Scott became concerned when he noticed that the great majority of defendants who appealed their traffic offense convictions from justice or municipal courts to the county court-at-law succeeded in having the charges against them dismissed or the fines reduced. In an "open letter" to county officials, Judge Scott attacked the district attorney's office and the county court-at-law for dismissing so many traffic tickets and called upon the county officials to offer suggestions to remedy the problem. The letter was circulated to the local press and prompted several newspaper articles. The Texas State Commission on

Judicial Conduct reprimanded the judge, and he filed a suit challenging the sanction on First Amendment grounds.

The truth of Scott's allegations was not contested. The court noted that it should be expected that the judge, as an elected official, would not only exercise independent judgment in the cases brought before him but also "be willing to speak out against what he perceived to be serious defects in the administration of justice in his county." Applying case law regarding the First Amendment rights of public employees, the court (1) asked whether, in light of its content, form, and context, the speech in question addressed a matter of legitimate public concern or dealt with a condition of the judge's employment, and (2) weighed the judge's free speech rights against the "interest of the State, as an employer in promoting the efficiency of the public services it performs through its employees." The court found that "in airing his views on the administration of the . . . [c]ounty justice system, Scott was speaking not as an employee about matters of merely private interest, but rather as an informed citizen regarding a matter of great public concern." The court also found that the goals of promoting an efficient and impartial judiciary "are ill served by casting a cloak of secrecy around the operations of the courts, and . . . by bringing to light an alleged unfairness in the judicial system, Scott in fact furthered [those] goals."

4.k. Criticizing Other Public Officials

California Canons: See Canon 5A(2) quoted at page 6-46.

ABA Model Code: Judges have even less license to criticize public officials other than judges. For example:

- In *In re Schenck (Ore. 1994)* 870 P.2d 185, *cert. denied* 513 U.S. 871, the Supreme Court of Oregon disciplined a judge for publicly criticizing the district attorney in a letter to the editor and guest editorial. The court held that a judge had no duty to report his evaluation of the performance of the district attorney, much less to a newspaper.

- In *Inquiry Concerning Graham* (1993) 620 So.2d 1273, *cert. denied* (1994) 510 U.S. 1163, the Florida Supreme Court disciplined a judge for, among other misconduct, repeatedly using his position to make allegations of official misconduct and improper criticisms against fellow judges, elected officials and their assistants, and others, without reasonable factual basis or regard for their personal and professional reputations.

- *In the Matter of Martin* (S.C. 1993) 434 S.E.2d 262, a judge was disciplined for interrupting a town council meeting, levying accusations of criminal conduct against the town police chief, and calling on the council to suspend the chief.
- However, in *In re Jimenez*, (Texas Special Court of Review, 1992) 841 S.W2d 572, the court found that "a judge should reveal, not conceal, acts by police officers that may constitute crimes."

5. Lending the Prestige of Office to Advance Private Interests

<u>California Canons</u>: One consideration is the use of the accouterments of judicial office in the program. See, e.g., Canon 2B. The California Judges Association Ethics Committee stated that a judge's participation as a judge in a weekly half-hour commercially sponsored reenactment of actual traffic court cases created a reasonable suspicion that the power and prestige of his office was being used to promote a commercial product. *California Advisory Opinion 10* (1958). The television show was sponsored by an automobile dealers' association, began and ended with announcements of the sponsor, and was interrupted with commercials designed to sell cars.

The committee noted that: (1) the program used the judge's name, official title, and robes; (2) the judge portrayed the main role on the program in his capacity as a judge, performing the same acts he performed in the exercise of his official duties; and (3) the judge served as technical advisor and controlled the selection, preparation, and presentation of material. The committee asked, "Is it not really the use of his name and the power and prestige of his title and judicial office that attract the attention of the viewer, first to the program, and then to the sponsor and its product?"

In contrast, in a subsequent opinion, the committee stated that a judge could participate as a moderator on a public educational television program to facilitate responses to viewers' questions by a panel of three attorneys. *California Advisory Opinion 28* (1983). To distinguish its earlier opinion, the committee noted that: (1) the judge would not be wearing judicial robes, and the program was not set in an authentic courtroom setting, (2) the format did not portray the judge as a judge performing judicial duties, and (3) the program was not commercially sponsored but was funded by a grant from a law book publishing company, which was announced at the beginning and conclusion of the program. The committee concluded that because "the program is not commercially sponsored, it should not be susceptible of appearing that the power or prestige of judicial office is being utilized to promote a business or commercial product," noting that "it is common knowledge that production of even the most modest of television programs requires considerable financial backing, and but for that contribution would not be possible." The committee found that "the public benefit in sparking interest in the law, educating prospective clients on certain areas of interest, and presenting the law in a dignified and professional setting far outweighs any remote possibility present here that the judge will be perceived as a salesman for those making the grant; the judge will not announce the grant nor be identified personally with the grantor's product."

ABA Model Code: Concerns that a judge's appearance on television or in a newspaper may "lend the prestige of judicial office to advance" private interests (Canon 2B) have also resulted in limitations on the formats permitted for judges' educational activities. For example:

- A judge's regular participation on a question-and-answer radio talk show would clearly lend the prestige of office to advance the radio station in an area where the public perceives the judge to be an expert. *South Carolina Advisory Opinion 14-1991.*
- Judges could rotate authorship of a newspaper column designed to educate the public about matters such as child abuse and child support laws, jury service, and criminal sentencing only if their authorship would not appear to promote one local newspaper over others. *Alabama Advisory Opinion 86-265.*
- A judge's appearance on news segments for a television station to explain diverse legal matters to the public, including high-profile trials such as the O. J. Simpson civil trial, would lend judicial prestige to the commercial interests of the station. *Florida Advisory Opinion 96-25.*
- A judge's regular appearances on Court TV to comment on cases pending in other jurisdictions allowed the prestige of his judicial office to be used to advance the private interests of commercial television. *In re Broadbelt* (N.J. 1996) 683 A.2d 543, *cert. denied* (1997) 117 S.Ct. 1251.

However, not every appearance by a judge on a media outlet, even a commercial enterprise, is improper. The court in *In re Broadbelt* gave several examples of acceptable appearances, such as (1) a municipal court judge may make an isolated appearance on public television to comment on the role of municipal court judges in the judiciary, and (2) a superior court judge may make a one-time appearance on a commercial television program dealing with the benefits and disadvantages of televising civil trials. To determine whether appearing would be appropriate, the court stated that a judge should consider:

- The frequency with which the judge appears on the program;
- The intended audience;
- The subject matter; and
- Whether the program is commercial or noncommercial.

In the circumstances before it, the court concluded that the frequency of the judge's appearances resulted in an identification of the judge with the program, thereby lending it the prestige of his judicial office. The judge had appeared on Court TV more than 50 times in four years as a guest commentator and appeared on CNBC three times in two years to provide commentary on the O. J. Simpson case.

However, *New York Advisory Opinion 95-94* found that a judge may host a television show with no commercial sponsor on a public access station.

The Indiana Code of Judicial Conduct created an apparent exception to Canon 2B to allow judges to participate in educational activities without being concerned about inappropriate use of the prestige of judicial office. Commentary to Canon 2B of the Indiana code reads: "Lending the prestige of the judicial office to advance the public interest in the administration of justice in a free society may be done appropriately without the appearance of impropriety. The public has an interest in hearing the ideas of its judiciary within the public forum on matters concerning the administration of justice."

6. Soliciting Contributions of Money or Goods to Support Court and Community Collaboration Programs

<u>California Canons</u>: See Canons 2B(2) and 5A(3).

California Canon 4C(3)(d) specifically provides: "Subject to the following limitations and the other requirements of this Code, a judge as an officer, director, trustee, or nonlegal advisor, or as a member or otherwise

- **(i) may assist . . . an organization in planning fund raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may privately solicit funds for such an organization from other judges (excluding court commissioners, referees, retired judges, and temporary judges);**
- **(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system, and the administration of justice;**
- **(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or if the membership solicitation is essentially a fund-raising mechanism, except as permitted by Canon 4C(3)(d)(i);**
- **(iv) shall not permit the use of the prestige of his or her judicial office for fund raising or membership solicitation but may be a speaker, guest of honor, or recipient of an award for public or charitable service provided the judge does not personally solicit funds and complies with Canon 4A(1), (2), and (3).**

California Canon 4D(1) provides: "A judge shall not engage in financial and business dealings that (a) may reasonably be perceived to exploit the judge's judicial position, or (b) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to appear before the court on which the judge serves." The Commission on Judicial Performance has sent advisory letters to judges for seeking charitable contributions from the public and soliciting funds for a civic project. CJP 1994 Annual Report, no. 2, p. 18 and no. 35 p. 20.

Also, judges may find themselves having to deal with the situation of the receipt of gifts from well meaning members of community programs. Generally, the receipt of gifts is covered both by Canon 4 and Code of Civil Procedure 170.9 as well as the disclosure requirements of Fair Political Practices Code regulations. *See California Advisory Opinion 43*(1994) and *California Advisory Opinion 44* (1995).

7. Other General Provisions

Other general provisions of the canons of ethics should be kept in mind when judges engage in community collaboration activities.

<u>California Canons</u>: California Canon 1 provides: "A judge shall uphold the integrity and independence of the judiciary. An independent and honorable judiciary is indispensable to our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved."

California Canon 3B(11) provides: "A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity."

California Canon 4H provides: "A judge may receive compensation and reimbursement of expenses as provided by law for the extrajudicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety."

California Canon 6 provides: "Anyone who is an officer of the state judicial system and who performs judicial functions, including, but not limited to, a magistrate, court commissioner, referee, court-appointed arbitrator, judge of the State Bar Court, temporary judge, or special master, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided . . . ."